UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA

In re

Case No. 02-30120-DHW
Chapter 13

CHRISTOPHER ERIC BENDER,

Debtor.

OPINION ON MOTION TO PROHIBIT THE USE OF CASH COLLATERAL

Creditor First Citizens Bank filed a motion on March 1, 2002 to prohibit the debtor from using the insurance proceeds of the debtor's wrecked 1996 Peterbilt Truck in which the bank has a security interest.

The motion came on for final hearing on May 29, 2002. The parties submitted the motion to the court for decision on briefs of counsel. The following facts do not appear to be in dispute.

Facts

The debtor obtained a loan in the amount of $59,500.00 from First Citizens Bank in January 1999. To secure the loan, the debtor granted the bank a security interest in a 1996 Peterbilt Truck.

In October 2001, the truck was wrecked in an accident. Canal Insurance Company issued a check in November 2001 in the amount of $33,755.00 representing the value of the truck at the time of the accident ($36,260.00) less salvage value ($2,505.00). The insurance company made the check payable jointly to the debtor and First Citizens Bank.

The debtor attempted unsuccessfully to cash the check without an endorsement from First Citizens Bank. First Citizens Bank demanded turnover of the check from the debtor in order to apply the proceeds to the indebtedness. The debtor did not turn over the check.

The debtor obtained a repair estimate from Henderson Peterbilt in the amount of $15,000 and, at some point, authorized Henderson Peterbilt to commence repairing the truck without obtaining the bank's consent.

The debtor filed a petition under chapter 13 of the Bankruptcy Code on January 14, 2002.[1] The creditor filed a claim in the amount of $40,222.29. The debtor filed a chapter 13 plan, as amended, which is somewhat unclear. However, the debtor's brief reflects the debtor's intention to apply the insurance proceeds to repair the truck with the balance to be remitted to the bank:

> the proceeds of the check would be used to repair the truck and the Bank would be treated as a secured creditor based on the estimated value of the truck as repaired, less what is paid to the bank from the proceeds.

The plan valued the secured claim of the bank at $25,000.00 and proposed to pay 100% of allowed unsecured claims.[2] No objections to the plan were filed, and the plan was confirmed in open court on March 4, 2002.

Contentions of the Parties

First Citizens Bank contends that the debtor is prohibited from using the insurance proceeds for two reasons. First, the proceeds are not property of the estate. Second, even if the proceeds are property of the estate, the plan does not adequately protect the bank's interest in the

---

[1] After the filing of the case, the insurance company stopped payment on the check in the possession of the debtor. The insurance company issued a new check payable jointly to the debtor and the bank. The bank holds the new check.

[2] *See* Debtor's Reply Brief, June 13, 2002. The file does not contain any evidence of "the estimated value of the truck as repaired" except for the undisputed amount of the insurance check. However, subtracting the balance of the insurance proceeds remaining after the repair of the vehicle from the amount of the insurance check would produce a figure less than $25,000.

proceeds.

The debtor contends that the proceeds are property of the estate and that the plan adequately protects the bank's interest in the proceeds.

Conclusions of Law

Generally, 11 U.S.C. §§ 363 and 1303 allow a chapter 13 debtor to use cash collateral with court authorization upon the provision of adequate protection. 11 U.S.C. § 363(a) defines cash collateral as "cash equivalents . . . in which the estate and an entity other than the estate have an interest . . . ." In other words, the Code does not permit a debtor to use cash or cash equivalents in which the bankruptcy estate has no interest.

First Citizens Bank contends that the insurance proceeds of the 1996 Peterbilt Truck are not property of the estate for two reasons.

First, the bank contends that the proceeds are not property of the estate under the authority of *Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280 (11th Cir. 1998). The *Lewis* court held that an automobile which was repossessed prepetition was not property of a chapter 13 bankruptcy estate because title to the automobile had passed to the secured creditor.[3]

However, the facts in *Lewis* are distinguishable from the facts in the instant case. First Citizens Bank has neither repossessed the 1996 Peterbilt Truck nor cashed the check from the insurance company representing the value of the truck. Indeed, the bank could not cash the check without the debtor's endorsement.

The *Lewis* case has received negative commentary from a

---

[3] The court relied on decisions which declined to hold repossessing creditors liable for conversion because title had passed to the creditors. *Lewis*, 137 F.3d at 1283.

bankruptcy court within the Eleventh Circuit because of its failure to acknowledge the controlling authority of the Uniform Commercial Code as adopted in Alabama. *See Greene v. The Associates (In re Greene)*, 248 B.R. 583 (Bankr. N.D. Ala. 2000). A bankruptcy court in Georgia declined to follow *Lewis* based on differences in state law. *See American Honda Finance Corporation v. Littleton (In re Littleton)*, 220 B.R. 710 (Bankr. M.D. Ga. 1998). A bankruptcy court in Florida followed suit but the decision was later abrogated. *See In re Ratliff*, 260 B.R. 526 (Bankr. M.D. Fla. 2000) (abrogation recognized by *In re Ragan*, 264 B.R. 776 (Bankr. S.D. Fla. 2001). *Ragan* followed *Lewis* but with reservations. *See Ragan*, 264 B.R. 776. The Eleventh Circuit recently ruled consistently with *In re Lewis* in a case involving Florida law. *Bell-Tel Federal Credit Union v. Kalter (In re Kalter)*, 292 F.3d 1350 (11th Cir. 2002).

Although bound by the decision in *Lewis*, this court declines to extend the application of *Lewis* beyond the confines of the case. The court therefore concludes that *Lewis* does not exclude either the Peterbilt Truck or the insurance proceeds from property of the estate.

Second, the bank contends that the proceeds are not property of the estate citing *In re Suter*, 181 B.R. 181 (Bankr. N.D. Ala. 1994). The *Suter* court held that insurance proceeds from a totaled vehicle were not property of the estate because the creditor was the loss payee of the insurance policy.[4] The court noted in footnote that a different result might obtain if the creditor (1) had not been the loss payee on the policy or (2) if the insurance proceeds were payable jointly to the debtor and the secured creditor.

Suter relied on the following language in a decision by the Alabama Supreme Court:

A loss payable clause in an insurance policy gives the

---

[4] However, the court held that the debtor (as policy owner) was entitled to the proceeds which exceeded the creditor's interest in the vehicle.

> party named as the one to whom payment is to be made the *superior right* to recover to the extent of his or her interest, and the assured can only recover any balance in excess (emphasis added).

Home Ins. Co. of New York v. Tumlin, 241 Ala. 356, 2 So. 2d 435 (1941).

However, the Alabama Supreme Court did not hold that the insured has no right to the proceeds—only that a loss payee has a superior right to the proceeds. Superior right to the proceeds does not mean sole right to the proceeds. This court disagrees that the holding by the Alabama Supreme Court required the conclusion reached in *Suter*.

However, in the instant case, the bank may not even be the loss payee on the debtor's insurance policy. The debtor submitted a copy of the insurance policy on the 1996 Peterbilt Truck. The document makes no mention of a loss payee. However, the creditor submitted a copy of an Accord Certificate of Liability Insurance certifying First Citizens Bank as loss payee of the insurance policy covering the truck.

Whether or not the bank is loss payee, it is clear that the insurance proceeds were paid jointly to the debtor and the bank.[5] Therefore, *Suter* does not support the creditor's contention and does not exclude the insurance proceeds from property of the estate.

The Eleventh Circuit has held that a chapter 13 bankruptcy estate had an interest in the insurance proceeds of a totaled 1992 pickup truck even though the secured creditor was the loss payee of the policy. *Ford Motor Credit Company v. Stevens (In re Stevens)*, 130 F.3d 1027 (11th Cir. 1997). In reaching that determination, the court considered the "nature and type of the insurance policy involved, and its relationship to the

[5] According to the creditor, the check was made payable jointly both times it was issued.

property of the bankruptcy estate":[6]

> The policy at issue in this case is intended to protect both the owner and the secured creditor in the event of the destruction of the security (the truck). In the context of the insurance policy on the truck, therefore, the proceeds act as a substitute for the insured collateral.[7]

Because the insurance proceeds were held to be property of the estate, the terms of the confirmed plan, by which both parties were bound, governed distribution of the proceeds.

In the instant case, the court concludes that the insurance proceeds of the 1996 Peterbilt Truck are property of the bankruptcy estate and therefore "cash collateral" which the debtor may use upon adequately protecting the creditor's interest in the proceeds.

The debtor has made an offer of adequate protection through the debtor's confirmed chapter 13 plan. Although the plan is somewhat unclear, the court finds that the plan as described in brief by the debtor adequately protects the creditor's interest in the collateral. The debtor will use the proceeds to repair the truck and remit the balance to the bank.[8] The plan values the secured claim of the creditor at $25,000 and proposes to pay 100% of unsecured claims. The plan was confirmed without any objection by the bank, and both parties are bound by the plan. 11 U.S.C. § 1327(a).[9]

---

[6] *Stevens*, 130 F.3d at 1030.

[7] *Id.*

[8] It appears that the repairs will more than dollar for dollar enhance the value of the truck.

[9] Though value may be an open question following confirmation, the bank has not filed an adversary proceeding to determine the extent of its lien.

A separate order will enter denying the bank's motion to prohibit the debtor's use of the cash collateral.

Done this 19th day of July, 2002.

Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtor
Richard D. Shinbaum, Attorney for Debtor
Leonard N. Math, Attorney for Creditor
Curtis C. Reding, Trustee